80-916

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Respondent

vs

William "Billy" DiNardi, Sr.
Petitioner

October Term
1980

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA
Respondent

vs

William "Billy" DiNardi, Sr.
Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the admission of testimony concerning the substance of an anonymous phone call which was offered to prove the truth therein asserted violated the Defendant's Right under the Sixth Amendment of the United States Constitution to be confronted by the witnesses against him?

The Petitioner contends the answer is "YES".

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CITATIONS TO OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Sixth Circuit is set out in the Appendix page 1. There is no official published opinion in this matter.

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JURISDICTIONAL STATEMENT

Opinion of the United States Court of Appeals for the Sixth Circuit affirming the conviction and sentence of Petitioner in the United States District Court for the Eastern District of Michigan was rendered on September 30, 1980. The Jurisdiction of this court is invoked under USCA 28 §§ 1254. The opinion of the Court of Appeals is in direct conflict with any sense of Due Process and Equal Protection of the Law and the right to confront witnesses in that it allowed into evidence the substance of an anonymous phone call which offered no chance to cross-examine such anonymous witness.

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

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CONCISE STATEMENT OF FACTS

The defendant was charged, in a four count indictment, with conspiracy to Make, Possess and Sell Counterfeit Currency; Counterfeiting United States Currency; Possession of Counterfeit Currency; and Selling Counterfeit Currency.

Trial in this matter was begun on September 11, 1979 in the United States District Court for the Eastern District of Michigan, Southern Division, before the Honorable Ralph M. Freeman and a jury. The trial lasted approximately three weeks. The government's case was based on circumstantial evidence and, for the most part was based on the testimony of the alleged co-conspirators of the Defendant. Because the trial transcript in some 1362 pages in length, for the convenience of this honorable Court, the Defendant will rely on the lengthy arguments of both counsel made during the Motion for Acquittal. These arguments present a fair exposition of the testimony in this case.

It was the contention of the government that in the early part of 1977 the Defendant, his business partner, Doda Lucaj, and another man entered into an agreement to counterfeit money. Doda Lacaj testified that the three men allegedly gathered the necessary equipment and leased a building in Detroit, Michigan. The Defendant played no role in the printing of the money but, when Doda Lacaj alledgedly told the Defendant that the money was ready, the Defendant supposedly stated that he would take care of it.

Testimony was also introduced as to an attempt by Doda Lucaj and Martin Sinishtaj to sell the counterfeit money to undercover agents. Doda Lucaj allegedly

called the Defendant and told him to bring the money to a restaurant. However the money was not delivered by the Defendant but by someone else. Federal agents did testify that the Defendant was seen driving in the area at the time of the delivery.

A third circumstantial episode involved certain phone calls. Doda Lucaj, in prison on the instant charges, agreed to assist the government in recovering the money. Doda Lucaj allegedly called his former business partner, the Defendant, and asked him, in early 1979, to "drop the money". The Defendant was then to call Nick Lucaj and inform him of where the money could be found. In May of 1979, Mick Lucaj received an anonymous call. The call was not from the defendant. Nick Lucaj immediately informed the government agents of the location of the money. The agents searched through a number of garbage cans in Detroit to no avail. The money was subsequently recovered when the owner of the garbage cans attempted to sell the money to agents of the government.

The final circumstantial episode involved the testimony of another co-conspirator, Martin Sinishtaj who claimed that he had received a couple of sample bills from the Defendant at the office jointly used by Doda Lucaj and the Defendant.

On October 3, 1979, after three days of deliberations, the jury returned a verdict of guilty as to Count I, Conspiracy and not guilty as to Count II, Counterfeiting. The jury, after stating that they could not reach a verdict as to the other counts, was sent back to further deliberate. The following evening the jury returned a verdict of guilty as to Count III, Possession. The following morning, after being given five minutes to decide Count IV, a mistrial was granted on the count.

On December 20, 1979, the Defendant was sentenced as to Counts I and III to serve five years and ten years in prison respectively.

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CONCISE ARGUMENT

THE ADMISSION OF TESTIMONY CONCERNING THE SUBSTANCE OF AN ANONYMOUS PHONE CALL WHICH WAS OFFERED TO PROVE THE TRUTH THEREIN ASSERTED VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO BE CONFRONTED BY THE WITNESSES AGAINST HIM.

The Defendant contends that the District Court Judge abused his discretion in the instant case by allowing into evidence certain hearsay testimony concerning an anonymous telephone call which, by its speculative nature, was highly prejudicial to the Defendant's right to a fair and impartial determination by the jury. The government, in support of the twin charges of conspiracy to possess counterfeit currency and the substantive offense of possession of counterfeit currency, relied on various theories based on circumstantial evidence. One of these theories, which the government heavily relied on at trial, is the subject of this issue as it was in the Court below.

In order to allow the jury to draw the inference that the Defendant was in possession of certain counterfeit money, the government sought to put forward by way of testimony the substance of three phone conversations. it was the theory of the government that the Defendant was induced by a former co-conspirator now working for the government to hide the money. The Defendant was to then call the witness' brother with the information who in turn would notify the federal agents as to where the money could be found. In furtherance of this theory

the government put forward testimony concerning three telephone calls.

The first telephone conversation was testified to by Doda Lucaj, allegedly a former co-conspirator with the Defendant. In early 1979, Doda Lucaj, while in prison, agreed to assist the Federal Bureau of Investigation to recover some counterfeit money. Doda Lucaj testified that he allegedly called the Defendant and urged him to "drop the money". Doda Lucaj then allegedly told the Defendant that after the money was dropped, he, the Defendant, should call Nick Lucaj with the particulars of the money drop.

The second telephone conversation was between Nick Lucaj and a government agent. In response to this phone call, the agent believed that the counterfeit money could be found in a garbage can. The money however was discovered by the owner of the trash can and eventually recovered when the owner attempted to sell the currency to an undercover agent.

Finally, the government attempted to introduce a third telephone conversation between Nick Lucaj and an anonymous phone caller. After vigorous objection by the Defendant and a lengthy hearing by the Court, the government agreed not to divulge the conversation itself, but they were allowed to enter into evidence the fact of the anonymous phone call as the subsequent action of Nick Lucaj in contacting the federal agent and informing him where the money could be found. It is this anonymous phone call as well as the circumstances surrounding it to which Defendant contends prejudicial error attached.

The Sixth Amendment of the United States Constitution provides that an accused has the right to be confronted by the witnesses against him. **Dutton v Evans**, 400 US 74, 91 Ct 210, 27 L Ed 2d 213 (1970). A prime violation of the Sixth Amendment protection is the introduction of hearsay evidence. The government, in the instant case, originally argued that the contents of

the anonymous phone call were an exception to the hearsay rule since the anonymous phone caller was either an agent or a co-conspirator of the Defendant. This argument was based on the government's speculative theory that since Doda Lucaj had allegedly urged the Defendant to "drop the money" and since three months later Nick Lacaj received an anonymous phone call, therefore the caller must have some relation to the Defendant. It should be noted at this point that Nick Lucaj testified that he knew the Defendant and that the anonymous phone caller was not the Defendant.

In order for the testimony to have been admissable under the exception for conspiracy or agency, it would have first have to be shown that the anonymous phone caller was either a co-conspirator of the Defendant or an agent of the Defendant. **Dutton v Evans, supra.** However no evidence was presented to link the anonymous phone caller to the Defendant under either exception. Even assuming for the moment that Doda Lucaj had in fact urged the Defendant to help him out after his imprisonment, there is no connection to be found to the anonymous phone call received several months later. While the government continually argued that the calls must be somehow connected, there was no evidence, beyond idle speculation, that the Defendant was the connective ingredient. Furthermore there was in fact still alive at this point since the participants had been arrested. The government's argument that the conspiracy still existed between the Defendant and some unknown person quite frankly was an argument born of convenience and necessity and not of legal fact. Throughout the trial the conspiracy theory of the government assumed the shape of an accordian which enlarged or contracted as the government found necessary to admit evidence.

In any event, the government, after failing to introduce the conversation itself, was finally allowed to introduce the fact of the phone call and that Nick Lucaj

immediately called the government agent to tell him where the money could be found. Stated simply the effect of this admission was to introduce by the back door that which could not be introduced through the front door. By allowing the government to permit Nick Lucaj to testify that he received an anonymous phone call and that five minutes after he received the anonymous phone call he called the FBI agent and related the anonymous phone message concerning the location of the money, the government was able to place before the jury the testimony of an unknown witness whom the defendant could not cross-examine.

The danger of this blatantly prejudicial trial tactic was recognized in **United States v Finazzo**, 288, F 2d 175 (CA 6, 1961); **cert. den.** 368 US 837, 82 S Ct 37, 7 L Ed 2d 38. In **Finazzo** the government sought to introduce the testimony of a witness concerning conversations the witness had with persons unconnected with the Defendant. While the District Court allowed the witness only to testify as to his half of the conversation and excluded the statements of the other persons, the Court of Appeals disagreed:

> "Strictly speaking, such testimony is not hearsay. But in many instances such testimony, if given in enough detail and not limited to a very few statements, will clearly convey to the jury the answers made by the other party to the conversation, even though they are not stated by the witness, and for all practical purposes will have the same result as if the witness had stated what the other party to the conversation said. If the testimony of the witness indicates that it will lead to that result, it should, upon proper objection thereto, be held inadmissible."

In the instant case, it was readily apparent from the testimony of Nich Lucaj, Doda Lucaj and the federal

agent, Brush, the contents of the anonymous phone conversation. The government made the noble gesture of purportedly introducing this conversation solely to show that a phone call was received and to show the state of mind of the agent. As such the testimony would not necessarily be hearsay. However once the testimony was introduced, the government dropped all their pretenses. Once into evidence, the government continually argued that the phone call was proof that the Defendant was in possession of the money. Thus, their platitudes aside, the government offered, and used, the testimony of the phone call to prove the truth therein asserted. During the argument on the Motion for Acquittal, the government specifically relied on the anonymous phone conversation to argue the Defendant's possession of the counterfeit money. Moreover, in their closing agrument, they again relied on the hearsay conversation to prove possession. Thus, it cannot be argued at this late date that the phone call was introduced for non-hearsay purposes only.

Furthermore, the instant case bears great resemblance to **United States v Bourjaily**, 167 F2d 993 (CCA 7, 1948) where, during a mail fraud case, the government introduced the substance of telephone calls to unnamed persons. In order to prove that the Defendant had devised a scheme to collect for unauthorized advertisements, the government introduced the testimony of one of the accused's employee's who had talked to about 500 of the victims. The employee testified that many of these unnamed persons had told him that they had not authorized any advertisements. The Court of Appeals held the testimony to be inadmissible since the Defendant had no means to cross-examine the unknown persons.

Likewise, in the instant case, the government offered the testimony of an anonymous phone caller to prove that the Defendant was in possession of the counterfeit money. However, since the unknown person

was not present in court, the Defendant could not question him as to how he knew where the money was located and who, if anyone, he was working for. The jury was, however, allowed to speculate on the point and, infact, was urged by the government to assume the Defendant was involved. Yet the basis for this speculation was merely nicely packaged hearsay.

Finally, the error here presented cannot be considered a harmless error. Involving, as it does, a violation of the Confrontation Clause of the Constitution the test on review, as stated in **Chapman v California**, 386 US 18, 87 S Ct 824, 17 L E d 2d 705 (1967), is whether the reviewing court is able to "declare a belief that it was harmless beyond a reasonable doubt."

The instant case rested in circumstantial evidence which, for the most part, was composed of the testimony of purported accomplices who freely admitted that they had previously perjured themselves in relation to this case. This type of evidence, while admissible, has traditionally been viewed with great caution. **United States v Miller**, 451 F2d 1306 (CA 4, 1971). Moreover, the government heavily relied upon the anonymous phone call incident to prove its case. While there may have been other theories of equally dubious value put forward by the government in support of its case, it cannot be said that the jury did not rely on the inadmissible hearsay to decide on conviction. This is especially true since the government specifically urged the jury to consider the hearsay evidence and from the fact that the jury deliberated four days on the possession charge and repeatedly expressed difficulty reaching a verdict. Therefore, it is quite probable that the inadmissible testimony affected the jury and it would be speculation to assume it was ignored. Consequently, the admission of the defective testimony coupled with the denial of an opportunity to confront the unknown witness, denied the Defendant a fair trial and hence his conviction should be reversed.

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APPENDIX

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80-5012

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v. ORDER

WILLIAM "BILLY" DINARDI, SR.,
Defendant-Appellant

Before: KEITH and MERRITT, Circuit Judges, and WISEMAN, District Judge*

Defendant-Appellant appeals his conviction on charges of conspiracy to make, possess and sell counterfeit currency and actually possessing counterfeit currency. He was sentenced to 5 years and 10 years on the charges respectively by Judge Freeman of the Eastern District of Michigan.

Defendant alleges two grounds for reversal.

First, he contends that admission in evidence of the fact that an anonymous telephone call occurred in conjuction with 1) testimony that the receiver of the call related the sub-

stance of the conversation with the anonymous party to a third person, 2) testimony as to the subsequent actions of the third person amounts to either hearsay or prejudicial error within the rule of United States v. Finazzo 288 f2d 175 (6th Cir. 1961). However, such testimony is not hearsay because it is not offered for the truth of the communication discussed in the conversation. See United States v. Campbell, 466 F2d 529, 531 (9th Cir. 1972). Indeed in this case nothing at all was related regarding the out-of-court statements, hence the Finazzo rule is not applicable. See Enlow v. United States, 239 F2d 887 (10th Cir. 1957).

Defendant-Appellee also contends that the district judge used the wrong standard in ruling on his Motion for Acquittal. He draws attention to the following exchange at trial:

> "Mr. Viviano:....However, I would also point out to the court that the testimony has to generate belief beyond a reasonable doubt, and that's the question that the Court decides....
> "THE COURT" (Interposing) No, I don't de-

> cide that. I only decide whether there is substantial evidence."

He contends that the court applied a different standard than required by law. However, upon a reading of the above exchange in the context of the rest of the transcript, it is clear that the court appled the correct standard here. In our view, the court decided whether there was substantial evidence for a reasonable minded jury to support a conclusion of defendant's guilt beyond a reasonable doubt. See Burks v. United States, 437 U.S. 1 (1978) and United States v. Green, 548 F2d 1261 (6th Cir. 1977).

Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

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